No. 95-2076

Supreme Court, U.S.
FILED
JUL 29 1996

In The

Supreme Court of the United States

October Term, 1995

NELSON FERNANDES,

Petitioner,

vs.

ROCKAWAY TOWNSHIP TOWN COUNCIL, TOWNSHIP ENGINEER, R.V.R.S.A. & EXECUTIVE DIRECTOR, E.P.A. & REGIONAL ADMINISTRATOR OF REGION II, DORSEY AND BELL, JOHN DORSEY and JOSEPH BELL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondents, Rockaway Township Town Council, Township Engineer, Dorsey & Bell, John Dorsey and Joseph Bell, submit this brief in opposition to the Petition for a Writ of Certiorari filed by Nelson Fernandes. As to the Rockaway Township respondents and their attorneys, this Court has once before reviewed the issues raised by petitioner and found them to be wanting. In 1993, following litigation in both the federal and state courts, Mr. Fernandes filed a Petition for Writ of Certiorari in an action captioned *Fernandes v. Rockaway Township Town Council, et al.*, a petition which this Court denied.[1]

Despite his first unsuccessful round of federal and state litigation, petitioner commenced a second federal action alleging the same facts, however, certain new parties were added as defendants. Among those new defendants were Rockaway Township's attorneys, Joseph Bell, John Dorsey and the law firm of Dorsey & Bell.

Relying on *res judicata* and collateral estoppel, the Rockaway Township respondents and their attorneys moved for summary judgment before the Honorable William H. Walls, U.S.D.J. on March 27, 1995. Judge Walls granted the respondents' motion for summary judgment rendering an opinion from the bench [Appendix A hereto] and the Order dismissing the petitioner's amended complaint was entered on May 11, 1995 [Appendix B hereto]. Petitioner's appeal to the United States Court of Appeals for the Third Circuit followed, and, on March 26, 1996, the Third Circuit affirmed Judge Walls' Order. This petition for a writ of certiorari followed.

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1. *Fernandes v. Rockaway Township Town Council and Township Engineer,* 510 U.S. 863, 114 S. Ct. 181, 126 L. Ed. 2d 140 (1993).

REASONS FOR DENYING THE WRIT

All of the issues raised by petitioner with respect to the Rockaway Township respondents and their attorneys have been heard before, and the courts below properly concluded that all of petitioner's claims were barred by either *res judicata* (claim preclusion) or collateral estoppel (issue preclusion).

As to the Rockaway Township respondents and their attorneys, petitioner raises two points:

> (1) that Rockaway's Ordinance §54-100 L violates equal protection, case law and a state statute (Petition at 21); and
>
> (2) that Joseph Bell, Township Attorney for the Township of Rockaway, and the Township of Rockaway and its municipal engineer, committed a fraud upon a state court in a prior proceeding and that the fraud of the attorney and the township engineer supported an inference that they were concealing a town council policy of fraud and civil rights violations (Petition at 25-8).

Both of these issues were raised before.

In his earlier Petition for Writ of Certiorari, (No. 93-88), Mr. Fernandes attacked Rockaway Township's Ordinance § 54-100 L, albeit couched in slightly different terms. In *Argument 3* to his earlier Petition in No. 93-88 entitled, "*ROCKAWAY TOWNSHIP VIOLATED ITS GRANT OF POLICE POWER AND POWER TO CONTRACT*", Mr. Fernandes wrote:

> Rockaway Township passed § 54-100 L,

a land use ordinance which prohibits connection of wetland lots to the sewer treatment plant. It did so in support of a contractual condition which contravenes a federal statute. Rockaway's legislative act was required by the following holding:

*"A municipality cannot act as an individual does: it must proceed in conformity with statute or, **in the absence of statute, with the common law, by ordinance**, or resolution or by motion: this is especially true with respect to real estate." Skowysz v. City of Ventnor*, 110 N.J. Super. 340, 265 A.2d 554 (1970).

However, the passage of this ordinance, as well as their approval of the grant condition as a member of the RVRSA, not to mention the RVRSA's acceptance of the grant condition, was beyond their power to contract and their police powers based on the following holdings:

"The grant of police power 'relates to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability.' " Wagner v. Mayor and Municipal Council of City of Newark, 24 N.J. 467, 478 (1957).

"Hence the municipality may not legislate upon an aspect of a subject 'inherently in

> *need of uniform treatment.' " In re Public Service Electric and Gas Co.*, 35 N.J. 358, 371 (1961) [Emphasis original].

In addition, petitioner raised the same argument with respect to fraud upon a court. In *Argument 9* to his earlier Petition in No. 93-88 entitled "*TOWNSHIP ATTORNEY ACTED AS AN ADVOCATE-WITNESS AND RISKED A FRAUD UPON THE COURT,*" Mr. Fernandes wrote:

> Mr. Bell created the impression that the Council was unaware of the grant condition until he brought this fact to their attention. He then states the contrary in a brief to Judge Russell:
>
> *"Mr. Fernandes admits, by his own affidavit, that he knew of the EPA Grant Condition (**and the Township's concealment of same and decision to sell despite it**)."*
>
> By admitting that the council deliberately concealed the Grant Condition, he admits his misstatement and the town's concealment. Had the court not dismissed these issues, he and the engineer would have testified to a fact that he subsequently recants. Mr. Bell's actions meet the following finding, which resulted in a new trial:
>
> *"even if the lawyer has no duty to disclose the whole truth, he does have a duty not to deceive the trier of fact, an obligation not to hide the real facts behind a facade." U.S. Ex*

Rel. Triano v. Superior Ct. of N.J., 393 F. Supp. 1061 (1975).

Mr. Bell admits the truth to Judge Russell in order to make it appear the petitioner's case is beyond the statute of limitations for the federal claims. However, Judge Russell didn't accept this contention, based on the following finding:

"But he didn't know, he thought it came on after he got the property."

Mr. Bell's retort confirms the Council's presale knowledge, *"That doesn't mean we didn't."* [Emphasis original].

Thus, the issues raised in petitioner's second Petition for a Writ of Certiorari are virtually identical to those raised in petitioner's prior Petition for Writ of Certiorari which was denied on October 4, 1993. There is no reason for this Court to grant petitioner's second Petition.

I.

THE COURTS BELOW PROPERLY CONCLUDED THAT ALL OF PETITIONER'S CLAIMS WERE BARRED BY EITHER CLAIM PRECLUSION [*RES JUDICATA*] OR ISSUE PRECLUSION [COLLATERAL ESTOPPEL].

In his most recent federal action, petitioner raised the same claims arising from the same nucleus of operative facts which were unsuccessful in his first round of litigation against Rockaway Township respondents. As found below, petitioner's second federal action adds additional parties as defendants but

asserts no new claims against the Rockaway Township respondents or their attorneys. A partial record of prior proceedings between petitioner and the Rockaway Township respondents and their attorneys reveals that:

- Petitioner's first Complaint was dismissed on November 28, 1990 without prejudice by United States Federal District Court Judge Maryann Trump Barry sitting in the United States District Court for the District of New Jersey for failure to adequately state a claim for violation of any federal constitutional rights [Civ. Action No. 90-830 (MTB)];

- Petitioner's motion to file an amended complaint in the federal court was denied on September 21, 1991, at a time when Judge Barry was aware that Judge Harper in the Superior Court of New Jersey had dismissed all but two of the counts of plaintiff's state court complaint [Civ. Action No. 90-830 (MTB)];

- Petitioner's state court action was dismissed on the merits by New Jersey Superior Court Law Division Judge John J. Harper on July 10, 1991, and by Judge Karen Russell on January 2, 1992 [Docket No. MRS-L-5845-90];

- Petitioner's appeal of the Law Division dismissal was affirmed after appellate review by the New Jersey Superior Court Appellate Division [Docket No. A-4311-91; Appendix C hereto];

- Petitioner's petition for certification was denied by the New Jersey Supreme Court on March 15, 1993[2], as was petitioner's motion for reconsideration on May 11, 1993; and

- Finally, petitioner's petition for writ of certiorari was denied by the United States Supreme Court on October 4, 1993.[3]

Petitioner's most recent Federal Court Complaint, coming directly on the heels of the denial of his Petition for Certiorari by this Court, could only have been motivated by his continued personal annoyance at the Rockaway Township respondents and their attorneys. All of Mr. Fernandes' complaints against the Rockaway Township respondents and their attorneys had been aired before, and petitioner's misguided attempt to obtain a "second bite of the apple" was appropriately dismissed.

As the procedural history reveals, petitioner's claims against the Rockaway Township respondents and their attorneys have been presented and reviewed by the trial benches of both the federal and state courts and properly tested through appellate review all the way to the highest court of the United States in petitioner's first round of litigation.

In the second round of litigation, Judge Walls, sitting in the United States District Court for the District of New Jersey, after a comprehensive review of the record, concluded:

> As I said originally to him, I repeat to all

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2. *Fernandes v. Rockaway Township Town Council, et al.*, 133 N.J. 437 (1993).

3. 510 U.S. 863, 114 S. Ct. 181, 126 L. Ed. 2d 140 (1993).

parties, with regard to the claims brought against Rockaway Township, the Town Council and Township Engineer, all of those, in my opinion, have been the subject of res judicata. His claims against Rockaway Township, the Town Council and the Township Engineer have been adequately and fully, in my opinion, presented and tested before trial judges and through the process of appellate review.

These matters, as I said, were denied. The merits of them were found to be wanting by two Superior Court judges and later by the Appellate Division, which action was reviewed by our highest tribunal. Because these claims have already been adjudicated, they are therefore barred. All of the elements of res judicata are satisfied, and his claims against these parties are dismissed.

Plaintiff's claims brought against defendants Dorsey & Bell Law Office, John Dorsey and Joseph Bell, are dismissed by the doctrine of collateral estoppel. The thrust of that type of determination is that identical issues have been decided on prior adjudication. There has been a final judgment on the merits.

* * *

Furthermore, plaintiff contends defendant Joseph Bell admitted alleged concealment before the Superior Court. The

> issue of whether Rockaway Township concealed the grant petition[4] has already been adjudicated.
>
> The claim asserting knowledge of Rockaway Township's concealment made against the attorneys in the law office must per force fail if a court already determined that Rockaway Township did not conceal the grant condition, or that the burden of proof with regard to this assertion has not been met.
>
> Therefore, these matters having already been adjudicated adversely against him, they have to be dismissed, as I do now dismiss them, against the individual attorneys.

[Transcript of District Court Opinion, Appendix A hereto].

In both the federal and state courts, the doctrine of claim preclusion, also known as *res judicata*, prevents a party or its privies from having to relitigate a cause of action that has been finally determined on the merits. *See, e.g., Untracht v. West Jersey Health System*, 803 F. Supp. 978, 981 (D.N.J. 1992); *Velasquez v. Franz*, 123 N.J. 498, 505 (1991). Under federal claim preclusion law,

> Three basic elements are required before a court can invoke claim preclusion: (1) the judgment in the first action must be valid, final and on the merits; (2) the parties in the later action must be the same as, or in privity with, those in the first action; and (3) the

---

4. Should be "condition."

> claim(s) in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.
>
> * * *
>
> Not only does claim preclusion apply to claims actually litigated, but the New Jersey Supreme Court has explained that the doctrine applies to all claims that should have been brought in the earlier action.

Untracht, supra at 982. *See also, Board of Trustees v. Centra*, 983 F.2d 495, 504 (3d Cir. 1992); *Rodziewicz v. Beyer*, 809 F. Supp. 1164, 1166-70 (D.N.J. 1992); *Wheeler v. Nieves*, 762 F. Supp. 617, 623-24 (D.N.J. 1991).

Similarly, with respect to any state law claims, the principles of *res judicata* have now been well established by the New Jersey Supreme Court:

> The term "*res judicata*" refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated. . . In essence, the doctrine of *res judicata* provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding.
>
> * * *
>
> The rationale underlying *res judicata* recognizes that fairness to the defendant and

> sound judicial administration require a definite end to litigation. . . The doctrine evolved in response to the specific policy concerns of providing finality and repose for the litigating parties; avoiding the burdens of relitigation for the parties and the court, *ibid.*; and maintaining judicial integrity by minimizing the possibility of inconsistent decisions regarding the same matter.

Velasquez v. Franz, *supra* at 505.

Similarly, with respect to the party defendants added to the second round of litigation:

> Issue preclusion, formerly titled collateral estoppel, proscribes relitigation when the identical issue already has been fully litigated. Issue preclusion may be invoked when: (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question.

Board of Trustees, *supra* at 505.

There is simply no reason to allow this petitioner to relitigate the claims previously dismissed against the Rockaway Township respondents and their attorneys, whether those claims are asserted under state law in contract or in tort, for deprivation of federal civil rights, for federal constitutional violations or on

a conspiracy theory. All of petitioner's claims have been litigated at least once, they have all been dismissed, they have all been thoroughly reviewed by at least one appellate court and further applications for review have been denied by the highest state court and the highest federal bench. It is merely petitioner's personal pique that causes him to pursue these claims again. Under such circumstances, the interests of justice and fairness require that petitioner's request for further review by this Court be denied and that the matters decided below remain settled.

CONCLUSION

For the reasons set forth, and based upon the authorities cited hereinabove, it is respectfully requested that this Court deny petitioner's writ of certiorari.

Respectfully submitted,

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John Dorsey and Joseph Bell

APPENDIX A — PARTIAL TRANSCRIPT OF UNITED STATES DISTRICT COURT JUDGE WILLIAM H. WALLS DATED MARCH 27, 1995 GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 94-0338 (WHW)

FERNANDEZ,

Plaintiff,

-vs-

ROCKAWAY TOWNSHIP, ET AL,

Defendants.

TRANSCRIPT OF PROCEEDINGS
(EXCERPT)

March 27, 1995

BEFORE:

THE HONORABLE WILLIAM H. WALLS
UNITED STATES DISTRICT JUDGE

Appendix A

APPEARANCES:

NELSON FERNANDEZ, PRO SE.

BOYAR, HIGGINS & SUOZZO, P.A.
BY: JAMES J. HIGGINS, ESQ.,

-and-

MC MANIMON & SCOTLAND, ESQS.,
BY: JOSEPH J. MARAZITI, JR., ESQ.,

-and-

DOUGLAS R. CABANA, ESQ.,
Attorneys for Defendants.

[2] * * *

THE COURT: In August of 1985 Rockaway Township held a public sale of real property. That was done by auction. Property was sold "as is." No representations of any kind were made by the Township of Rockaway as to the condition, area or boundaries of the property sold.

Lot 8 was one of the land parcels which was available for bidding by the public. A portion of that lot was covered by the environmental sensitive fresh water wetlands.

The present plaintiff, Mr. Fernandez, won by bidding $10,000 for Lot 8, and he had a title search done at time of purchase and took title by deed recorded with the Morris County Clerk.

Appendix A

He later purchased Lot 9 adjacent to Lot 8, and according to his representations, planned to divide the two lots and build a single-family dwelling. He hoped to connect it to the sanitary sewer line that ran adjacent to his lots. However, his application was rejected because of a grant condition imposed by the federal government.

In 1983 the federal government had given or gave Rockaway Township a grant in order that the Township could build a sanitary sewer system.

According to that grant agreement, lots within that [3] environmental sensitive area could not be connected to federally funded sewers. The purpose of the condition was to protect the surrounding wetlands.

Unfortunately, plaintiff's lots are two of approximately 140 lots in the Township which were impacted by that grant condition.

Mr. Fernandez attempted to obtain a waiver from that ban of the EPA, but in 1989 Rockaway Valley Regional Sewerage Authority received a letter from the EPA's Acting Regional Administrator denying the request.

Consequently, Mr. Fernandez sought the aid of Federal Court, U.S. District Court for this district, and brought a complaint against Rockaway Township Town Council and the Township Engineer, and that complaint or a later amended complaint alleged ten causes of action, including alleged material misrepresentation, violation of statute and fraudulent concealment.

Appendix A

That was dismissed by Judge Barry of this Court on November 28, 1990 determining that it might be better for plaintiff to commence his action before the State Court, which he did.

Apparently in 1991, and again in 1992, his State Court actions were dismissed by the Superior Court of New Jersey.

He had in the amended complaint before the State [4] Court alleged:

(1) That the sale of property to him by Rockaway Township was in violation of state statute 40:A12-13.

(2) That there was a malicious policy and custom of Rockaway Township Town Council to sell worthless lots in violation of 42 USC section 1983.

(3) That the Township Engineer had conspired with the Town Council in carrying out this policy with regard to the sale of lots.

(4) That the Township Council members conspired among themselves to effect the sale of lots which represented a malicious abuse of governmental power.

(5) That there was, in addition, conspiracy to have the Township conceal the EPA grant condition.

(6) That the Township arbitrarily denied requests from owners of wetland lots to conceal the original conspiracy.

Appendix A

(7) That the Rockaway Township Engineer harassed plaintiff in violation of his constitutional rights.

(8) That such rights were infringed by the Township Engineer, which represented discrimination upon plaintiff who was a member of a minority.

(9) That there was fraud committed upon him and the public when the Rockaway Township made an "as is" sale, making it appear to conform to statutes.

[5] And lastly, that the Township sale of the lots contrary to the statute represents a taking and implied promise to pay compensation.

As I said before, this complaint was dismissed in two parts really by two Superior Court Judges, and thereafter exercising the right of automatic appeal to the Appellate Division. Again, Mr. Fernandez lost. The Appellate Division asserting in dismissing the matter, "We see no basis for breach of contract claims advanced by plaintiff to the extent he relies upon tort claims because of the personal injury aspect of the federal claims." He was barred by the statute of limitations, and also, that the claims pursuant to 42 USC section 1983 were barred by the New Jersey's two-year statute of limitations.

Thereupon, Mr. Fernandez sought relief from the New Jersey Supreme Court, which denied certification in March of 1993. He petitioned the Court for reconsideration which again was denied in May in 1993.

Thereafter he sought writ of certiorari from our United States Supreme Court, which was denied in October of 1993.

Appendix A

I think I fairly represented the procedural history, and now he commences this present action before this Court, having done so in January of last year, January 24, 1994.

[6] As I said originally to him, I repeat to all parties, with regard to the claims brought against Rockaway Township, the Town Council and Township Engineer, all of those, in my opinion, have been the subject of res judicata. His claims against Rockaway Township, the Town Council and the Township Engineer have been adequately and fully, in my opinion, presented and tested before trial judges and through the process of appellate review.

These matters, as I said, were denied. The merits of them were found to be wanting by two Superior Court judges and later by the Appellate Division, which action was reviewed by our highest tribunal. Because these claims have already been adjudicated, they are therefore barred. All of the elements of res judicata are satisfied, and his claims against these parties are dismissed.

Plaintiff's claims brought against defendants Dorsey & Bell Law Office, John Dorsey and Joseph Bell, are dismissed by the doctrine of collateral estoppel. The thrust of that type of determination is that identical issues have been decided on prior adjudication. There has been a final judgment on the merits.

The party against whom the bar has been asserted either was a party or in privity with a party of the former adjudication, and the party against whom the bar is associated had a full and fair opportunity to litigate the [7] issues in question.

Defendants John Dorsey and Joseph Bell of the Dorsey &

Appendix A

Bell law firm represented Rockaway Township in the first action. Plaintiff alleged in discovery, that said defendants were aware of the Rockaway Township's policy to sell wetland lots.

Furthermore, plaintiff contends defendant Joseph Bell admitted alleged concealment before the Superior Court. The issue of whether Rockaway Township concealed the grant petition has already been adjudicated.

The claim asserting knowledge of Rockaway Township's concealment made against the attorneys in the law office must per force fail if a court already determined that Rockaway Township did not conceal the grant condition, or that the burden of proof with regard to this assertion has not been met.

Therefore, these matters having already been adjudicated adversely against him, they have to be dismissed, as I do now dismiss them, against the individual attorneys.

* * *

APPENDIX B — ORDER DISMISSING PETITIONER'S AMENDED COMPLAINT FILED MAY 11, 1995

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 94-338 (WHW)

NELSON FERNANDES,

Plaintiff,

v.

ROCKAWAY TOWNSHIP TOWN COUNCIL AND TOWNSHIP ENGINEER, *et al.*,

Defendants.

ORDER DISMISSING AMENDED COMPLAINT AS TO ALL DEFENDANTS

THIS MATTER having been opened to the Court on March 27, 1995, Honorable William H. Walls, U.S.D.J. presiding, upon defendants' motions brought pursuant to Fed.R.Civ.P. 12(b)(1), Fed.R.Civ.P.12(b)(6) and Fed.R.Civ.P.56 to dismiss the Amended Complaint, by defendants, Rockaway Township Town

Appendix B

Council and Township Engineer by Boyar, Higgins & Suozzo, P.A. (James J. Higgins, Esq. appearing); by defendants, United States Environmental Protection Agency and Regional Administrator of Region II, by the United States Department of Justice (Mark A. Rigau, Esq. appearing); by defendants, Dorsey & Bell, John Dorsey and Joseph Bell, by Dorsey & Fisher (Douglas R. Cabana, Esq. appearing); and by defendants, Rockaway Valley Regional Sewerage Authority and Executive Director, by McManimon & Scotland (Joseph Maraziti, Esq. appearing); and on cross-motion of plaintiff, Nelson Fernandes for partial summary judgment (Nelson Fernandes, ***pro se*** appearing), and the Court having considered the papers filed by the moving parties and those submitted in opposition, having heard oral argument on March 27, 1995 and for good cause shown, all as set forth on the record;

IT IS on this 11th day of May, 1995:

ORDERED, that the motions of all defendants be and the same are hereby granted; and it is further

ORDERED, that the Amended Complaint be and the same is hereby dismissed with prejudice as to defendants, Rockaway Township Town Council and Township Engineer; Dorsey & Bell, John Dorsey and Joseph Bell; and Rockaway Valley Regional Sewerage Authority and its Executive Director, with no costs; and it is further

ORDERED, that the Amended Complaint be and the same is hereby dismissed without prejudice as to defendant, United States Environmental Protection Agency and Regional Administrator of Region II; and it is further

Appendix B

ORDERED, that plaintiff's motion for partial summary judgment be and the same is hereby denied; and it is further

ORDERED, that counsel for defendants, Rockaway Township Town Council and Township Engineer, shall serve a copy of this Order upon plaintiff *pro se* and all counsel appearing within 10 days of it having been entered.

s/ William H. Walls
WILLIAM H. WALLS, U.S.D.J.

APPENDIX C — NEW JERSEY SUPERIOR COURT APPELLATE DIVISION OPINION AFFIRMING JUDGMENT BELOW DISMISSING PETITIONER'S EARLIER STATE COURT CASE [DOCKET NO. A-4311-91] FILED JANUARY 22, 1993

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4311-91T2

NELSON FERNANDES,

Plaintiff-Appellant,

v.

ROCKAWAY TOWNSHIP TOWN COUNCIL AND TOWNSHIP ENGINEER,

Defendants-Respondents.

Argued December 9, 1992 — Decided JAN 22 1993

Before Judges Gaulkin and Stern.

On appeal from the Superior Court of New Jersey, Law Division, Morris County.

Nelson Fernandes, *pro se*, argued the cause for appellant.

Appendix C

Joseph Bell argued the cause for respondents (Dorsey & Fisher, attorneys; John H. Dorsey on the brief).

PER CURIAM

Plaintiff appeals from a judgment dismissing his complaint which sought rescission and damages from defendants following conveyance by the Township of Rockaway of a lot purchased by plaintiff at public auction. Plaintiff planned to build a residence on the property and on an adjoining lot which he subsequently purchased. His plans were frustrated, however, because of a sewer ban imposed by the United States Environmental Protection Agency (EPA). Plaintiff claims that defendants' conduct in selling the lot and thereafter, in the circumstances when the "Township did conceal the existence of the EPA Grant Condition," the engineer "covered up this concealment" and the Township created "a false impression that lots could be connected to the sewer" (even after "[p]ercolation test results . . . show[ed] these lots cannot support septic systems"), constituted a "taking" and violated his federal constitutional and civil rights and various provisions of state law.

Particularly given plaintiff's acknowledgment of the "auction information" indicating that the property was sold "as is," and acknowledging the "terms and conditions" of the sale as embodied in the governing resolution in which the Township expressly made "[n]o representations of any kind . . . as to the condition" of the property, and making the sale subject to "existing conditions, covenants and restrictions" of all relevant government entities including the United States of America and the Township, we see no basis for disturbing the judgment. *R.* 2:11-3(e)(1)(A), (E).

In light of those provisions, we see no basis for the breach of contract claims advanced by plaintiff. While plaintiff argues that "[t]he issue before the court is a breach of contract not a tort claim," and cites cases for the proposition "that contract issues are not subject to the Tort Claims Act," he cites no authority for the proposition that "the Township would have a duty to disclose the condition to every buyer" and, in essence, that before the sale a municipality must affirmatively disclose all facts which can be disclosed by appropriate searches and inquiries of government agencies. While there may be reasons to suggest that a municipality should generally advise prospective purchasers of a known sewer ban relating to property to be sold at public auction, this is a matter for legislative policy, and we are referred to no authority in statute or case law so holding. We reject plaintiff's argument that *N.J.S.A.* 40A:12-13 barred the sale as "restricted pursuant to law." To the extent plaintiff relies on tort claims because of the personal injury aspect of the federal claims, *see Wilson v. Garcia*, 471 *U.S.* 261, 105 *S.Ct.* 1938, 85 *L.Ed.2d* 254 (1985), no timely notice was given as required by statute. *See N.J.S.A.* 59:8-8, -9.

The trial court concluded that plaintiff's federal civil rights claim pursuant to 42 *U.S.C.A.* § 1983 was barred by New Jersey's two year statute of limitations. *See Wilson v. Garcia, supra*; *N.J.S.A.* 2A:14-2. Plaintiff does not contest the applicable period but contends that defendants waived the statute of limitations because they failed to raise the defense in their pleadings. However, the Supreme Court has recognized that the statute of limitations is not waived for failure to plead it as an affirmative defense when it is later raised, as here, in defendants' motion for summary judgment. *Fees v. Trow*, 105 *N.J.* 330, 335 (1987); *Rappeport v. Flitcroft*, 90 *N.J. Super.* 578, 579-81 (App. Div. 1966).

Appendix C

We also conclude that any procedural defects noted by the plaintiff, even if they constituted error, cannot be said to have affected the result.

Finally, as plaintiff was not a "prevailing party" he was not entitled to the award of counsel fees or costs. *See* 42 *U.S.C.A.* §§ 1983, 1988; *N.J.S.A.* 2A:15-59.1. *See also R.* 4:42-8,-9(a)(8); *N.J.S.A.* 22A:2-5.

The judgment is affirmed.